No. 9106

IN THE UNITED STATES

Circuit Court of Appeals

FOR THE NINTH DISTRICT

JAMES DIDIA,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANT

GRANVILLE EGAN,
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BRIEF OF APPELLANT

The defendant Didia was indicted, tried and convicted on four counts of violating Section 1304, Title 19, U. S. C. A., the pertinent part of which statute reads as follows:

"Subdivision D. PENALTY: If any person shall, with intent to conceal the information given thereby, or contained therein, deface, destroy, remove, alter, cover, obscure, or obliterate any mark, stamp, brand, or label required under the provisions of this chapter, he shall upon conviction be fined not more than Five Thousand Dollars or be imprisoned not more than one year, or both." The appellant was sentenced to imprisonment for twelve months and fined $2500.

The four counts of the indictment are set forth in pages two to seven of the record.

STATEMENT OF THE CASE

The indictments allege that the defendant had in his possession certain merchandise, to-wit, a table cloth or napkin which had heretofore been imported into the United States from a foreign country, to-wit, Japan, and which merchandise was marked, stamped, branded and labeled in legible English words in a conspicuous place in such manner as to indicate the country of origin of such merchandise with the words, to-wit, "Made in Japan" printed on a mark, stamp, brand and label attached to said merchandise in accordance with the rules prescribed therefor by the Secretary of the Treasury of the United States of America.

The indictments charge that the defendant knowingly, willfully and unlawfully, with intent to con-

ceal the information given on said mark, stamp, brand and label, removed and destroyed the same.

It is the contention of the appellant that the Government did not prove that the merchandise from which the appellant was supposed to have removed or destroyed the labels, ever was marked, stamped, branded and labeled, in legible English words, in a conspicuous place in such manner as to indicate the country of origin of such merchandise, to-wit, with the words "Made in Japan" printed on a mark, stamp, brand and label, attached to said merchandise. The appellant further contends that the Government never offered any proof that if there was such a mark or brand on the merchandise, that this mark or brand complied with the rules prescribed therefor by the Secretary of the Treasury of the United States of America.

There are two questions to be determined by this Court: First, "Must the Government prove as an essential element of the charge that the goods from which it is alleged that the labels were removed, bore a stamp, brand or label in a conspicuous place in legible English words in such a manner as to indicate the country of origin of such merchandise, with the words "Made in Japan" printed on a mark, stamp, brand or label, attached to the merchandise in accordance with the rules and regulations prescribed therefor by the Secretary of the Treasury of the United States." Second, "If such is an essen-

tial element of the charge, (a) did the Government prove that the goods were labeled, and (b) did the Government further prove that those labels complied with the rules and regulations of the Secretary of the Treasury of the United States, or did the Court permit the jury to infer that the goods bore such labels and that these labels complied with the regulations of the Secretary of the Treasury of the United States."

The matter comes here upon the denial by the Court of the motion of the defendant, timely made, to direct the jury to return a verdict for the defendant, finding him not guilty on all counts.

SPECIFICATIONS OF ERROR RELIED UPON

I.

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That the Court erred in denying the motion of the defendant-appellant made at the close of all of the evidence that the Court direct the jury in the cause to return a verdict for the defendant finding him not guilty on all counts upon the grounds and for the reason that there was no substantial or competent evidence to sustain the charge made in the various counts of the indictment, and upon the further grounds:

(a) That there was no testimony that Plaintiff's Exhibit 1 had ever been marked, stamped, branded

and labeled in legible English words, in a conspicuous place in such a manner as to indicate the country of origin, to-wit, with the words "Made in Japan" printed on a mark, stamp and label, attached to plaintiff's Exhibit 1 in accordance with the rules and regulations prescribed therefor by the Secretary of the Treasury of the United States.

(b) That there was no testimony that Plaintiff's Exhibit 2 had ever been marked, stamped, branded and labelled in legible English words, in a conspicuous place in such a manner as to indicate the country of origin, to-wit, with the words, "Made in Japan," printed on a mark, stamp and label, attached to Plaintiff's Exhibit 2 in accordance with the rules and regulations prescribed therefor by the Secretary of the Treasury of the United States.

(c) That there was no testimony that Plaintiff's Exhibit 3 had ever been marked, stamped, branded and labelled in legible English words, in a conspicuous place in such a manner as to indicate the country of origin, to-wit, with the words "Made in Japan" printed on a mark, stamp and label, attached to Plaintiff's Exhibit 3 in accordance with the rules and regulations prescribed therefor by the Secretary of the Treasury of the United States.

(d) That there was no testimony that Plaintiff's Exhibit 4 had ever been marked, stamped, branded and labelled in legible English words, in a conspicuous place in such a manner as to indicate the country

of origin, to-wit, with the words "Made in Japan" printed on a mark, stamp, and label, attached to Plaintiff's Exhibit 4 in accordance with the rules and regulations prescribed therefor by the Secretary of the Treasury of the United States.

(e) That there was no competent or substantial evidence to show that the defendant-appellant removed or destroyed any label or that he told any one of his employees to remove or destroy any label of any of the exhibits.

(f) That there was no competent or substantial evidence to show that if the exhibits ever were marked or labelled that the mark or label conformed with the rules and regulations prescribed therefor by the Secretary of the Treasury of the United States.

(g) That there was no competent or substantial evidence to show that a crime was committed by anyone.

II.

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That the verdict is contrary to the evidence for the reason that there was no competent evidence that the merchandise in question ever bore labels or that the merchandise was marked, stamped, branded and labelled in legible English words in a conspicuous place in such a manner as to indicate the country of origin, to-wit, with the words "Made in Japan"

printed on a mark, stamp, brand and label attached to the merchandise. This fact was one of the necessary elements to be proven beyond a reasonable doubt.

III.

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That the verdict is contrary to the law and instructions of the Court. The indictments charge the defendant with removing and destroying labels from merchandise made in Japan which "merchandise was marked, stamped, branded in legible English words in a conspicuous place in such a manner as to indicate the country of origin of such merchandise, to-wit, with the words "Made in Japan" printed on a mark, stamp, brand and label attached to the said merchandise, in accordance with the rules and regulations prescribed therefor by the Secretary of the Treasury of the United States of America". The Court properly instructed the jury that before they could find the defendant guilty, the United States must prove beyond a reasonable doubt all of the elements contained in the above quotation. There was no competent evidence upon which the jury could make such a finding.

ARGUMENT

Specification of Error No. 1: That the Court erred in denying the motion of the defendant-appel-

lant made at the close of all the evidence that the Court direct the jury in the cause to return a verdict for the defendant finding him not guilty on all counts upon the grounds and for the reason that there was no substantial or competent evidence to sustain the charge made in the various counts of the indictment, and upon the further grounds:

(a) That there was no testimony that Plaintiff's Exhibit 1 had ever been marked, stamped, branded and labelled in legible English words, in a conspicuous place in such a manner as to indicate the country of origin, to-wit, with the words "Made in Japan" printed on a mark, stamp and label, attached to Plaintiff's Exhibit 1 in accordance with the rules and regulations prescribed therefor by the Secretary of the Treasury of the United States.

(b) That there was no testimony that Plaintiff's Exhibit 2 had ever been marked, stamped, branded and labelled in legible English words, in a conspicuous place in such a manner as to indicate the country of origin, to-wit, with the words "Made in Japan" printed on a mark, stamp and label, attached to Plaintiff's Exhibit 2 in accordance with the rules and regulations prescribed therefor by the Secretary of the Treasury of the United States.

(c) That there was no testimony that Plaintiff's Exhibit 3 had ever been marked, stamped, branded and labelled in legible English words, in a conspicuous place in such a manner as to indicate the country

of origin, to-wit, with the words "Made in Japan" printed on a mark, stamp and label, attached to Plaintiff's Exhibit 3 in accordance with the rules and regulations prescribed therefor by the Secretary of the Treasury of the United States.

(d) That there was no testimony that Plaintiff's Exhibit 4 had ever been marked, stamped, branded and labelled in legible English words, in a conspicuous place in such a manner as to indicate the country of orgin, to-wit, with the words "Made in Japan" printed on a mark, stamp, and label, attached to Plaintiff's Exhibit 4 in accordance with the rules and regulations prescribed therefor by the Secretary of the Treasury of the United States.

(e) That there was no competent or substantial evidence to show that the defendant-appellant removed or destroyed any label or that he told any one of his employees to remove or destroy any label of any of the exhibits.

(f) That there was no competent or substantial evidence to show that if the exhibits ever were marked or labelled that the mark or label conformed with the rules and regulations prescribed therefor by the Secretary of the Treasury of the United States.

(g) That there was no competent or substantial evidence to show that a crime was committed by anyone.

The Court properly instructed the jury that there were three necessary elements in the charge in each of the four counts of the indictment. The second necessary element was:

"That the articles from which the United States alleges the defendants removed the labels had been marked, stamped, branded, and labelled in legible English in a conspicuous place in such manner as to indicate the country of origin of such merchandise, to-wit, with the words 'Made in Japan' printed on a mark, stamp, brand and label attached to the merchandise in accordance with the rules and regulations prescribed therefor by the Secretary of the Treasury of the United States of America."

That is a correct statement of the law as the writer views it, and taken in conjunction with the wording of the statute and the indictments, should settle Question No. 1, viz: whether the Government had to prove as an essential element of its case that the merchandise referred to in the various counts has been marked, stamped, branded and labelled in legible English words in a conspicuous place in such a manner as to indicate the country of origin of such merchandise, to-wit, with the words "Made in Japan" printed on a mark, stamp, brand and label attached to the merchandise in accordance with the rules and regulations prescribed therefor by the Secretary of the Treasury of the United States of America.

We can probably better reach our conclusion in the second matter by examining what proof the Government used to show that these goods bore such marks as described above. Plaintiff's Exhibit 3, which has to do with the third indictment, was the first piece of merchandise presented. Customs Agent A. S. Atherton attempted to supply all the necessary evidence on this one by stating that the defendant had told him that Exhibit 3 bore a label when it came into his store. However, on cross-examination, page 25, he admitted that the defendant had not said as was quoted, but answered to the effect that he assumed Plaintiff's Exhiibt 3 bore a label, because the other merchandise which was similar to it, and which the defendant had showed Mr. Atherton bore a label.

There are four counts in the indictment, and it is charged that labels were removed from four pieces of merchandise. The pieces of merchandise from which it is chargd that the labels were removed are numbered Exhibits 1, 2, 3, and 4, and they correspond with the Counts 1, 2, 3, and 4. The Government attempted to prove by the testimony of Ruth Minkove that Exhibits 1 and 2, which are covered by Counts 1 and 2 in the indictment, were imported into this country from Japan and bore labels according to the regulations of the Secretary of the Treasury.

Hilda Weisfield, who represented the importer who brought in the merchandise covered by Exhibit

3, was called to testify concerning the importation and labelling of Exhibit 3, and Y. Domoto, the importer who brought in Plaintiff's Exhibit 4, was called to testify concerning the importation and the labelling of Plaintiff's Exhibit 4.

(a) Ruth Minkove was a sales girl who had been employed by the defendant-appellant and subsequently was discharged by him. She testified that she recognized Plaintiff's Exhibit 1, and that the "Made in Japan" had been cut off with scissors pursuant to instructions. Upon cross-examination, on page 43, the witness testified that she didn't know when Plaintiff's Exhibit 1 was received in the store, and that no special person took the label off it. She further said that she did not know who had Plaintiff's Exhibit 1 before the appellant received it. On page 45, she adds that on the back of the sales slips of the New Linen Center, it states that customers may return goods and customers did return goods, but that she doesn't know if Plaintiff's Exhibit 1 was ever out of the store, or whether it was returned. There is no showing that she has any knowledge as to whether or not the merchandise was imported or whether or not it bore a label at the time it was brought into appellant's store, nor could she identify that specific piece of merchandise.

(b) Ruth Minkove stated on page 38 that Plaintiff's Exhibit 2 was brought in from Japan, and that it had a little gold label on the corner of the cloth

stating "Made in Japan." She further stated that it had been torn off. On cross-examination, on page 43, she said that one of the girls took the little label off, but then she added that maybe the label fell off and that maybe this one did, and she did not know whether the label was taken off, pulled off, or fell off. As in Plaintiff's Exhibit 1, there is no showing that the Plaintiff knew whence Plaintiff's Exhibit 2 came or whether or not it ever had a label on it while it was in the store. She stated that these labels could have been torn off by a customer, or by an employee, and that she doesn't know who tore it off or if it fell off (page 45).

(c) Hilda Weisfield, the customs broker who was brought from New York, testified that her house had imported Plaintiff's Exhibit 3, and that it had a mark on it when it came into this country. However, on cross-examination, page 28, she says:

> "I don't know from my own knowledge that Plaintiff's Exhibit 3 had a mark on it from actually seeing it, and I assume it had a mark on it because it came through Customs and they would have told us about it if it did not have a mark on it."

Her testimony is simply an inference, and is based upon the presumption that the customs men inspect every single piece of merchandise and mark any piece of merchandise which has been up to that time unmarked.

(d) The Government attempted to prove by Y. Domoto, the broker who was brought from San Francisco, that Plaintiff's Exhibit 4 had a label on it, at the time it was brought into this country. He so testified on direct examination. However, on cross-examination, he says:

> "The basis of my knowledge that Plaintiff's Exhibit 4 had a label on it is not that I saw a label on it, but I believe that if it came through Customs, it had a label on it."

This is just another example of an inference based upon a presumption. Like the other customs broker, he presumes that the customs men put a label on every single piece of merchandise that comes into this country, and, therefore, he infers that this particular piece of merchandise had a label on it.

Let us see what the customs men themselves say as to what they do about putting a label on every piece of merchandise that comes into this country. Customs Agent Atherton testified as follows:

> "When an importation of table-cloths comes from a foreign country, the customs department does not open each package. They open every package in some shipments, but they do not open every package in other shipments. On some importations, every article is minutely examined; on other importations only a percentage is examined under the regulations."

It thus becomes apparent that the presumption

of the customs brokers indulged in is unfounded, because they presumed that the customs men put a stamp on every single piece of merchandise that comes into the country, whereas the testimony of the customs men themselves shows to the contrary.

This type of evidence has no place in a law suit, and has been rejected by every court that has ever considered it. The rule is stated in 10 *R. C.* L., page 870:

> "It is a well-established rule that a presumption can be legally indulged only when the facts from which the presumption arises are proved by direct evidence, and that one presumption cannot be deduced from another. To hold that a fact inferred or presumed at once becomes an established fact, for the purpose of serving as a base for a further inference or presumption, would be to spin out the chain of presumptions into the regions of the barest conjecture."

This was quoted with approval in our State in *Johnson vs. Western Express Company,* 107 Wash., page 344.

In 16 *Corpus Juris,* page 534, we find the rule:

> "There can be no presumption against the accused of a fact essential to his conviction."

In *State vs. Laris* (1931), 78 Utah 183; 2nd Pac., Sec. 243, the Court quotes the old rule that the burden of proving the crime necessarily extends to every essential element of crime.

The leading case on the rule that a public officer is presumed to do his duty is *United States vs. George Ross* (1876), 92 U. S. 281, 23 Law Ed. 707. There the plaintiff had three bales of cotton in a warehouse in Rome, Georgia, at the time the Federal forces occupied the city. This cotton was moved to another warehouse. All of the cotton in that warehouse was then moved to Kingston. 42 bales of cotton were received by the quartermaster at Chattanooga from the quartermaster at Kingston, and by him shipped to Nashville where it was turned over to the Treasury agents and sold. Ross contended that the cotton which reached Nashville was his. He maintained, and the Court of Claims found, that the military officers who handled the cotton were presumed to have done their duty, and to have forwarded the claimant's cotton to Nashville and to the Treasury agents as was their duty. In overruling this contention, the Supreme Court said:

> "The presumption that public officers have done their duty, like the presumption of innocence, is undoubtedly a legal presumption, but it does require proof of the substantive facts. * * * Nowhere is the presumption held to be a substitute for proof of an independent and mere material fact."

The Court further said:

> "They are inferences from inferences; presumptions resting on the basis of another presumption. Such a mode of arriving at a conclu-

sion of fact is generally, if not universally, inadmissable. No inference of fact or of law is reliably drawn from premises which are uncertain."

Wharton in his book on criminal evidence says at page 91:

"An opinion based upon probability is wholly insufficient to overcome the presumption of innocence."

And in *Wolf vs. United States,* C. C. A. (4th) 238 Fed. 902, the Court said:

"Moral probability, however, strong, cannot take the place of legal evidence."

Maney vs. Boisie Title and Trust Company (1926) —Okla., 244 Pac. 170—was an action brought under deficiency judgment which had been secured in Idaho. The statute of Idaho provided that the deficiency judgment had to be first recorded by the Clerk in his office. The evidence was that the sheriff had made his return, and that it was then the duty of the Clerk to record such deficiency judgment. The plaintiff contended that he was entitled to the presumption that the officer had done his duty, and, therefore, the act had been done. In refuting this, the Supreme Court of Oklahoma said:

"The rule is well established that the law presumes that a public officer had done his duty but it is equally well established that such a presumption cannot be used as a substitute for proof of a definite and material fact."

The Court of Appeals of Ohio in the case of *Dennis vs. State* (1931), 180 N. N. 63, said in reversing the conviction of the defendant:

> "The conviction could only be had from inference upon inference which is not sufficient in a civil action to maintain a judgment, much less would it be sufficient to sustain a conviction on a criminal charge wherein the State must prove a charge beyond a reasonable doubt."

There is a long and comprehensive anotation of this subject in 95 A. L. R., page 172. That writer made an exhaustive search of the authorities and has listed them at some length in that anotation. He there states the rule to be:

> "Stated rather more accurately, the rule is to the effect that while the inferred fact may become the basis of another inferred fact, yet in the beginning of the line of inferences, there must be found a proven or known fact."

That rule has been adopted by all the federal courts, and the writer feels that it is particularly applicable to our set of circumstances. Here the only evidence which has been introduced by the Government to prove that the goods in question ever did bear a mark is based upon the inference made by the customs brokers that the customs officers had performed certain acts, namely, stamping every piece of merchandise that comes into the country. This is not a sound presumption because it is not true, as is shown

by evidence. The federal courts admit of no deviation from this rule.

In *Gargotta vs. United States* (1935), C. C. A., 8th Circuit, 77 Fed. 2nd, 977, the defendant was convicted on three counts of receiving, concealing, etc., two pistols property of the United States, knowing that they had been stolen. The Government contended that possession by the defendant of the stolen pictols 293 days after the theft, raised the legal presumption that the defendant stole them. The court said that there was such a thing as the possession of stolen goods raising a presumption of guilty knowledge or of stealing by the possessor, but this presumption could arise only when the possession was so recent from the theft that ample time and opportunity may not have been given to transfer the stolen property from the thief to another. There the court says that an inference cannot be based upon the presumption unless the evidence is such that the presumption permits of no exception under the circumstances.

Ross vs. United States, supra, was quoted from in *Nations vs. United States,* 1931, C. C. A. 8, 52 Fed. 2nd, page 105. There the court cites numerous cases upholding the rule and following the case of Ross against the United States.

Specification of Error No. 2: That the verdict is contrary to the evidence for the reason that there was no competent evidence that the merchandise in

question ever bore labels or that the merchandise was marked, stamped, branded and labelled in legible English words in a conspicuous place in such a manner as to indicate the country of origin, to-wit, with the words "Made in Japan" printed on a mark, stamp, brand and label attached to the merchandise. This fact was one of the necessary elements to be proven beyond a reasonable doubt.

The arguments advanced and the cases cited under Specification of Error No. 1, naturally control throughout all of the Specifications of Error in this brief. The writer is not waiving any of his specifications, but it would serve no good purpose to fill this brief with the same material which has already been written under Specification of Error No. 1. However, since there has been no evidence that proves the marking of this merchandise, the verdict is contrary to the evidence.

Specification of Error No. 3: That the verdict is contrary to the law and instructions of the Court. The indictments charge the defendant with removing and destroying labels from merchandise made in Japan which "merchandise was marked, stamped, branded in legible English words in a conspicuous place in such manner as to indicate the country of origin of such merchandise, to-wit, with the words "Made in Japan" printed on a mark, stamp, brand and label attached to the said merchandise, in accordance with the rules and regulations prescribed there-

for by the Secretary of the Treasury of the United States of America." The Court properly instructed the jury that before they could find the defendant guilty, the United States must prove beyond a reasonable doubt all of the elements contained in the above quotation. There was no competent evidence upon which the jury could make such a finding.

The verdict is clearly contrary to law and the instructions of the Court because the Court properly instructed the jury that one of the three necessary elements in the charge was the allegation that the articles from which the United States alleges the defendant removed the labels had been marked, stamped, branded and labelled in legible English words, in a conspicuous place in such manner as to indicate the country of origin of such merchandise, to-wit, with the words "Made in Japan" printed on a mark, stamp, brand and label attached to the merchandise, in accordance with the rules and regulations prescribed therefor by the Secretary of the Treasury of the United States. Since there is no evidence on which the jury can make a finding that these goods had been marked, the verdict was necessarily contrary to the instructions of the Court and to the law.

The writer feels that he would be derelict in his duty to this Court and to his client if, before he finished, he did not call the attention of the Court to the sentence which was imposed herein. There should

be a reasonable proportion between the crime charged and the punishment imposed. In the opinion of the writer, the punishment and sentence imposed are decidedly disproportionate. It appears more so when one realizes that the Loose-Wiles Biscuit Company of Minneapolis was fined the sum of five hundred dollars for this very thing; that Kress & Company was simply required to show cause by the Federal Trade Commission why they should not desist from removing Made in Japan labels from toothbrushes; and when a merchant in Seattle, engaged in the same business as the appellant here, and arrested at the same time as the appellant here, charged with the same crime as the appellant here, received a fine of fifty dollars from Judge Neterer. The writer earnestly requests the Court to take the question of the sentence into consideration in arriving at its decision.

In conclusion, we respectfully submit that the Government failed utterly to offer any competent evidence tending to prove that the merchandise in question here ever did bear any labels, and that if the merchandise had labels at one time, that those labels conformed to the rules and regulations of the Secretary of the Treasury of the United States. There is absolutely no proof as to what those rules and regulations were or are, there having been no proof submitted to the jury, there was no evidence upon which they could base their findings, and, there-

fore, the lower Court committed error in denying the motion of the defendant for a directed verdict on all counts.

We respectfully submit that for the reasons above given, the case should be reversed with instructions that a new trial should be granted.

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